

READING THE COURT’S LIPS: REEVALUATING NEVADA’S SUPERMAJORITY REQUIREMENT IN THE WAKE OF *SETTELMAYER*

*Samuel Holt**

TABLE OF CONTENTS

INTRODUCTION	236
I. PRELUDE TO <i>SETTELMAYER</i> : A HISTORY OF NEVADA’S SUPERMAJORITY REQUIREMENT FOR REVENUE INCREASES	237
A. <i>Read My Lips: A Broken Promise and Backlash from the States</i>	238
B. <i>Gibbons and the Antitax Movement in Nevada</i>	240
C. <i>Challenging the Constitutionality of the Supermajority Requirement</i>	243
II. THE <i>SETTELMAYER</i> CASE: THE SCOPE OF THE SUPERMAJORITY REQUIREMENT IN QUESTION	245
A. <i>SB 542 & SB 551: Legislation Not Quite Super Enough</i>	246
B. <i>In the District Court</i>	247
C. <i>In the Nevada Supreme Court</i>	248
III. AFTERMATH OF <i>SETTELMAYER</i> : SHOULD NEVADA RECONSIDER THE SUPERMAJORITY REQUIREMENT	250
A. <i>Nevada’s Political Landscape: Is a Repeal Even Viable</i>	251
B. <i>Nevada’s Policy Landscape: Is the Supermajority Requirement Good for Nevada</i>	252
1. <i>Trust in Elected Officials</i>	252
2. <i>Bipartisanship as a Policy Goal</i>	253
3. <i>Workability of the Supermajority Requirement</i>	256
C. <i>Brokering a Compromise: Adding Rather than Taking Away</i>	258

* J.D. Candidate, William S. Boyd School of Law, 2023. This is dedicated to my parents who loved and supported me through the writing process and through law school. Thank you to Charity, my sister and best friend, for encouraging me and for listening to me talk through my ideas and thoughts for this Note. Thank you to Professor Francine Lipman for sparking my passion and interest in tax law, for your guidance and expertise throughout the writing process, and for your mentorship through law school. Finally, thank you to all the editors and staff at the Nevada Law Journal for your diligence and hard work.

INTRODUCTION

Less than three decades ago, a little-known Nevada assemblyman, Jim Gibbons, authored a one-paragraph amendment to the Nevada state constitution and introduced the amendment in the state legislature.¹ Gibbons's proposed amendment would require a supermajority vote in the state legislature to pass any increase in revenue.² The Nevada legislature rejected the amendment.³ But that was not the end of the story. In 1994 and 1996, the Nevada voters sided with Gibbons and passed the constitutional amendment by popular vote.⁴ The supermajority requirement, however, has proven to be a thorn in the side of the legislative majority, as minority interests wield significant power over the state's purse strings due to the supermajority requirement.⁵ The requirement has faced two significant legal challenges since its enactment—one in 2003⁶ and one in 2019.⁷ Both legal challenges landed in the Nevada Supreme Court's docket. Most recently, in *Legislature of the State of Nevada v. Settelmeyer*, the Court faced questions about the scope of the supermajority requirement.⁸

In Spring of 2021, the court certified the broad, far-reaching nature of the supermajority requirement when it issued its *Settelmeyer* opinion.⁹ *Settelmeyer* was a welcome win for the Republican legislative minority—but a blow to the Democrat majority.¹⁰ *Settelmeyer* has raised fresh concerns about the practical workability and policy legitimacy of requiring a supermajority for all revenue increases, especially in a state with an already-limited tax landscape.¹¹ Howev-

¹ *Voters Never Smile upon Tax Hikes*, L.V. REV. J. (Apr. 5, 2009, 9:00 PM), <https://www.reviewjournal.com/opinion/voters-never-smile-upon-tax-hikes/> [<https://perma.cc/RPF3-AQ7D>].

² *Id.*

³ See *Guinn v. Legislature of the State of Nevada (Guinn I)*, 71 P.3d 1269, 1273 (Nev. 2003), *overruled by* *Nevadans for Nevada v. Beers*, 142 P.3d 339 (Nev. 2006).

⁴ *Voters Never Smile Upon Tax Hikes*, *supra* note 1.

⁵ See generally April Corbin Girmus & Michael Lyle, *Foiled Again by Gibbons Rule, Dems Show Little Appetite for Trying to Change It*, NEV. CURRENT (May 14, 2021, 6:16 AM), <https://www.nevadacurrent.com/2021/05/14/foiled-again-by-gibbons-rule-dems-show-little-appetite-for-trying-to-change-it/> [<https://perma.cc/DH63-DSL6>].

⁶ *Guinn I*, 71 P.3d at 1272; *Guinn v. Legislature of the State of Nevada (Guinn II)*, 76 P.3d 22 (Nev. 2003), *cert. denied*, 124 S. Ct. 1662 (2004).

⁷ *Legislature of the State of Nevada v. Settelmeyer*, 486 P.3d 1276 (Nev. 2021). Admittedly, *Settelmeyer* was decided in 2021—not 2019. *Id.* However, the legal challenge started in the district court in 2019. See discussion *infra* Part II.

⁸ *Settelmeyer*, 486 P.3d at 1280.

⁹ *Id.* at 1276, 1284.

¹⁰ See Girmus & Lyle, *supra* note 5.

¹¹ *Id.*

er, political dynamics in Nevada make a complete repeal extremely unlikely,¹² leaving critics with limited but still viable alternatives.

Part I of this Note will describe the history of Nevada's supermajority requirement, explaining how national political forces leading up to the 1990s created a ripe environment for antitax policy in Nevada. Part II will provide an in-depth explanation and analysis of the *Settelmeyer* case—from the legislation that provoked the legal challenge to the Nevada Supreme Court's decision. Finally, Part III will consider whether the supermajority requirement is good public policy for Nevada and whether critics of the provision have a path to repeal or amend the supermajority provision.

I. PRELUDE TO *SETTELMAYER*: A HISTORY OF NEVADA'S SUPERMAJORITY REQUIREMENT FOR REVENUE INCREASES

No voter smiles upon a tax increase. It is hard to imagine any voter gleefully heading to the polls to cast a vote in favor of paying more of his or her income to the government. In recent decades, politicians have taken the cue that “pledging tax increases is not the passport to electoral success.”¹³ The American conservative movement has not only refrained from supporting tax increases but has made tax reductions a staple of its electoral platform.¹⁴

This antitax sentiment has not always wielded such influence over national or state politics. In fact, after the introduction of the federal income tax in 1913, tax increases were the norm for decades.¹⁵ “[T]hrough the entire administrations of [P]residents Franklin Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter, the top-tax-bracket rate was at least 70 percent, and for long periods” it was substantially higher than that.¹⁶ The political winds though shifted sharply in the 1980s.

The antitax movement gained unprecedented popularity under Ronald Reagan's presidential reign. By 1980, the top income tax rate had hovered around 70 percent for a decade and a half.¹⁷ In 1980, Ronald Reagan ran for president on the platform of spurring economic activity through individual and

¹² *See id.*

¹³ Steve R. Johnson, *Supermajority Provisions*, *Guinn v. Legislature and a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 505 (2004).

¹⁴ *Id.* Terms like “government sponsored theft” or the “pillaging . . . by out-of-control government” are commonly used to personify taxation as a social evil rather than an essential part of a civilized society. *See* Leo P. Martinez, *Tax Legislation and Democratic Discourse: The Rhetoric of Revenue and Politics*, 4 NEV. L.J. 510, 517 (2004).

¹⁵ *See* James Fallows, *When the Top U.S. Tax Rate Was 70 Percent—or Higher*, ATL. (Jan. 25, 2019), <https://www.theatlantic.com/notes/2019/01/tax-rates-davos/581257/> [<https://perma.cc/D9PQ-M72D>].

¹⁶ *Id.*; *Historical Highest Marginal Income Tax Rates*, TAX POL'Y CTR. (Feb. 9, 2022), <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates> [<https://perma.cc/UHB9-ZCN5>].

¹⁷ *See Historical Highest Marginal Income Tax Rates*, *supra* note 16.

business tax cuts.¹⁸ By 1981, newly elected President Reagan worked with Congress to pass the Economic Recovery Tax Act of 1981, reducing individual tax rates by 25 percent.¹⁹ By the end of his second term in 1988, Reagan had taken the top income tax rate from 70 to 28 percent—a shocking 42 percent decrease within an eight-year period.²⁰

During the 1984 presidential election, Democratic candidate Walter Mondale berated Reagan over his failure to balance the budget, and Mondale pledged that he would support tax increases if elected.²¹ Conversely, Reagan promised more tax cuts if re-elected.²² Mondale learned the hard way that the public's sentiment toward tax policy had taken a sharp right turn since the 1970s, as Reagan in 1984 won one of the most epic electoral landslides in American history.²³ The 1984 electoral landslide was a warning to Democrats and Republicans that tax increases were a new political landmine—a political landmine that would soon blow up in the face of Reagan's own vice president.

A. *Read My Lips: A Broken Promise and Backlash from the States*

With the curtain closing on President Reagan's second term in 1988, the then-Vice President, George H.W. Bush, sought to succeed his boss.²⁴ After clinching the Republican nomination, Bush faced sliding poll numbers—he was trailing Democratic opponent Michael Dukakis by as much as seventeen points.²⁵ Bush sought to reverse the political tides by riding the waves of Reagan's economic success and promising no tax increases.²⁶ Bush stood before the delegates at the Republican National Convention and famously vowed: “Read my lips: no new taxes.”²⁷ Bush's pledge was a two-pronged effort: one, to align himself with Reagan's popular tax-cut agenda and two, to draw a contrast with an opponent that Bush wanted to define as a “tax and spend liberal.”²⁸

¹⁸ Bernard M. Shapiro, *Presidential Politics and Deficit Reduction: The Landscape of Tax Policy in the 1980s and 1990s*, 50 WASH. & LEE L. REV. 441, 441 (1993).

¹⁹ Charles E. Jacob, *Reaganomics: The Revolution in American Political Economy*, 48 L. & CONTEMP. PROBS. 7, 7 (1985).

²⁰ See *Historical Highest Marginal Income Tax Rates*, *supra* note 16.

²¹ Shapiro, *supra* note 18, at 443.

²² *Id.*

²³ See *United States Presidential Election of 1984*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1984> [<https://perma.cc/JSZ9-H9KZ>].

²⁴ See *United States Presidential Election of 1988*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1988> [<https://perma.cc/2P7D-M89D>].

²⁵ See Philip Klein, *How George H.W. Bush's Broken 'No New Taxes' Pledge Changed American Politics and Policy Forever*, WASH. EXAM'R (Dec. 1, 2018, 2:36 AM), <https://www.washingtonexaminer.com/opinion/how-george-h-w-bushs-broken-no-new-taxes-pledge-changed-american-politics-and-policy-forever> [<https://perma.cc/E3TP-82GK>].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Bush's electoral strategy worked. He handily beat Dukakis and ascended to the presidency.²⁹

However, by 1990, President Bush was under pressure to strike a deal with the Democrat-controlled Congress and to sign a 3 percent tax increase into law.³⁰ Bush eventually relented and agreed to the tax increase.³¹ The tax cut purists in Congress quickly revolted against Bush and unsuccessfully sought to stop the budget deal.³² Bush's broken promise went down as one of the "most famous broken promises in political history," inciting an onslaught of national and state backlash against tax increases.³³

Americans for Tax Reform, a conservative tax group, immediately began asking Republican candidates at the national and state levels to sign a pledge opposing any tax increase.³⁴ Bush lost his reelection bid in 1992, with some opining that the American people read Bush's actions all too clearly and returned a verdict on Bush as wimpy and untrustworthy.³⁵ Upon reclaiming Congress in 1994, Republicans, whose attitudes were shaped by the betrayal of 1990, entered Congress with a stern, uncompromising attitude toward the Democrats, leading to budget deadlocks and government shutdowns.³⁶

The political temperature on taxes was not just hot at the national level. State governments also reacted to Bush's broken promise with a flurry of anti-tax legislation. In 1992, Arizona, Colorado, and Oklahoma led the charge and passed amendments to their state constitutions requiring a legislative supermajority in order to pass any tax increase.³⁷ Other states, including Washington, Michigan, Oregon, Louisiana, South Dakota, and Missouri, followed suit soon after and implemented similar constitutional requirements for tax increases.³⁸

²⁹ See *United States Presidential Election of 1988*, *supra* note 24.

³⁰ See Klein, *supra* note 25; *Historical Highest Marginal Income Tax Rates*, *supra* note 16.

³¹ See Klein, *supra* note 25.

³² See *id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See *id.*; *United States Presidential Election of 1988*, *supra* note 24.

³⁶ See Klein, *supra* note 25.

³⁷ Bert Waisanen, *State Tax and Expenditure Limits—2010*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx> [<https://perma.cc/E442-4UY7>]. Interestingly, that same year in 1992, Colorado passed another constitutional amendment (nicknamed the Taxpayer Bill of Rights or TABOR) that disallowed tax increases without voter approval. See BLAINE HARTMAN & DOMINIC WALKER, *THE EFFECT OF TABOR ON COLORADO MUNICIPALITIES 2* (2015). The proposed amendment failed twice at the polls until it narrowly passed with 53 percent support in 1992 (the election immediately after Bush's infamous broken promise). See *id.*

³⁸ See Waisanen, *supra* note 37. Although many states adopted supermajority requirements after the Bush presidency, supermajority requirements for tax increases originated from the post-Reconstruction and Jim Crow eras—in Mississippi, Arkansas, and Louisiana. See MICHAEL LEACHMAN ET. AL., *CTR. ON BUDGET & POL'Y PRIORITIES, ADVANCING RACIAL EQUITY WITH STATE TAX POLICY 1–2* (2018), <https://www.cbpp.org/research/state-budget-and-tax/advancing-racial-equity-with-state-tax-policy> [<https://perma.cc/2MMM-RWMD>].

The political climate in the 1990s was ripe for antitax legislation in Nevada as well. And one Nevada assemblyman would grasp the opportunity to dramatically affect Nevada's tax policy.

B. Gibbons and the Antitax Movement in Nevada

In 1988, at the conclusion of Reagan's presidency, Jim Gibbons won his first election as Washoe County's Republican state assemblyman.³⁹ In 1993, Gibbons spearheaded the effort to adopt a supermajority requirement like those adopted in Oklahoma, Arizona, and Colorado.⁴⁰ Gibbons drafted Assembly Joint Resolution (AJR) 21 and introduced the resolution in the Nevada Assembly.⁴¹ If passed, AJR 21 would amend the Nevada Constitution to require a two-thirds supermajority of each house of the legislature to increase revenue.⁴² When AJR 21 was proposed, the Republicans had a slim one-member majority in the Nevada Senate, while the Democrats had more than double the representatives as Republicans in the Nevada Assembly.⁴³

Gibbons testified before the Assembly Committee on Taxation in support of AJR 21.⁴⁴ Gibbons argued that "the government did not have a funding problem, but a spending problem."⁴⁵ Gibbons claimed that Nevadans were tired of funding a "wasteful" and "inefficien[t]" government.⁴⁶ He iterated that "taxes always reduced the amount of money that would have been used by the private

Many of those early supermajority requirements were aimed at "stripping political power" from newly freed African American slaves. *Id.* Mississippi's supermajority requirement was clearly aimed at "disenfranchis[ing] nearly all of the state's Black voters," as the legislative history of the requirement is fraught with dehumanizing racial slurs. *Id.* at 1. Supermajority requirements in those three states remain in place. *Id.* at 2.

³⁹ NEV. SEC. 'Y OF STATE, 1988 GENERAL ELECTION RETURNS, at 12 (1988).

⁴⁰ *Hearing on AB 331 and AJR 21 Before the Assembly Comm. on Tax'n*, 67th Sess. 12–13 (Nev. 1993) [hereinafter *Hearing on AJR 21*].

⁴¹ *See id.*; *Nevada Among Few 'Supermajority' States*, L.V. SUN (June 22, 2003, 11:25 AM), <https://lasvegassun.com/news/2003/jun/22/nevada-among-few-supermajority-states/> [<https://perma.cc/7FZB-65KJ>].

⁴² *Hearing on AJR 21*, *supra* note 40, at 11.

⁴³ *Nevada State Legislature*, BALLOTEDIA, https://ballotpedia.org/Nevada_State_Legislature [<https://perma.cc/Q5AU-LWWS>] (providing the political composition of the Nevada Legislature from 1992–2020).

⁴⁴ *Hearing on AJR 21*, *supra* note 40, at 13–15 (discussions involving Assembly members James A. Gibbons, Larry L. Spittler, and Myrna T. Williams).

⁴⁵ *Id.* at 11.

⁴⁶ It is documented that prior to running for governor, Jim Gibbons signed the Americans for Tax Reform pledge. *See supra* text accompanying note 34; *Ensign, Gibbons Sign "No New Tax" Pledge*, L.V. SUN (Oct. 19, 1996, 11:59 AM), <https://lasvegassun.com/news/1996/oct/09/ensign-gibbons-sign-no-new-tax-pledge/> [<https://perma.cc/P8R5-34ZB>]. Ironically, however, it is documented that Gibbons broke the pledge multiple times as governor. *See, e.g.*, Patrick M. Gleason, *Nevada Governor Jim Gibbons is Fibbin. . . . Again*, AMS. FOR TAX REFORM (Feb. 18, 2010), <https://www.atr.org/nevada-governor-jim-gibbons-fibbin-again/> [<https://perma.cc/D5Z3-BNC3>]; *Hearing on AJR 21*, *supra* note 40, at 11.

sector.”⁴⁷ Gibbons’s testimony is strikingly similar in substance and style to that of Reagan—emphasizing the ills of government spending⁴⁸ and subtly characterizing taxes as a form of theft from the private sector are rhetorical locutions from Reagan’s playbook.⁴⁹

Legislators critical of the amendment were concerned that the supermajority requirement would disrupt the structure of the legislature by empowering the minority to “tell the majority exactly what to do.”⁵⁰ One legislator noted that the supermajority requirement could hamper the state’s ability to efficiently manage a growing state population.⁵¹ Legislators also presciently⁵² pointed out that the supermajority requirement could create a constitutional crisis because a minority of legislators might disagree with the majority, refuse to consider any revenue increases until their budgetary concerns were met, and thus create a deadlock.⁵³ The legislature in the end voted down Gibbons’s constitutional amendment.⁵⁴ However, Gibbons’s fight was not over. In 1994, Gibbons and his wife drafted the “Gibbons Tax Restraint Initiative” and sought to place the two-thirds supermajority requirement on the 1994 ballot.⁵⁵ Gibbons collected 85,000 signatures from residents across Nevada and, thereby, placed the initiative before the Nevada voters.⁵⁶

⁴⁷ *Hearing on AJR 21*, *supra* note 40, at 11.

⁴⁸ Although there is some debate about who made the phrase “not a revenue problem, but a spending problem” a politically vogue term, Reagan is often credited with coining the locution—or at least making it popular. See David Weigel, “It’s Not a Revenue Problem. It’s a Spending Problem”: Tracing the History of a GOP Talking Point, SLATE (Apr. 18, 2011, 6:33 PM), <https://slate.com/news-and-politics/2011/04/not-a-revenue-problem-a-spending-problem-tracing-the-history-of-a-republican-talking-point.html> [<https://perma.cc/V3GX-C36L>]. After his first tax cut passed into law in 1982, Reagan stated, “We don’t have a trillion-dollar debt because we have not taxed enough . . . but we have a trillion-dollar debt because we spend too much.” *Id.*

⁴⁹ Reagan did not expressly state that taxes were a form of theft. He characterized them more subtly as unfairly depriving private businesses and citizens of hard-earned income. See *9 Ronald Reagan Quotes About Taxes*, HOUSE GOP (Apr. 24, 2015), <https://www.gop.gov/9-ronald-reagan-quotes-about-taxes/> [<https://perma.cc/4724-A2QE>] (attributing to Reagan “Simple fairness dictates that government must not raise taxes on families struggling to pay their bills,” and “You can’t be for . . . big taxes . . . and still be for the little guy.”). This more subtle characterization of taxes is similar to Gibbons’s approach here.

⁵⁰ *Hearing on AJR 21*, *supra* note 40, at 15.

⁵¹ *Id.*

⁵² The legislators were prescient because a “constitutional crisis” involving the supermajority requirement erupted years after its enactment. See *infra* Section II.C.

⁵³ *Hearing on AJR 21*, *supra* note 40, at 14–15.

⁵⁴ See *Guinn I*, 71 P.3d 1269, 1273 (Nev. 2003).

⁵⁵ See *Jim Gibbons, Republican Governor*, THE RECORD-COURIER (July 31, 2006), <https://www.recordcourier.com/news/2006/jul/31/jim-gibbons-republican-governor/> [<https://perma.cc/85Z4-6CFF>] (outlining Gibbons’s record of public service in Nevada).

⁵⁶ *Id.*

Gibbons ran for governor alongside the initiative in 1994.⁵⁷ Gibbons made taxes a central campaign issue.⁵⁸ Gibbons opened the debate against the incumbent governor by endorsing the “Gibbons Antitax Initiative”—his name for the supermajority ballot provision.⁵⁹ He argued that Nevada was in a “desperate situation” because of the “oppressive” and “heavy” tax burden on the “working men and women in the state.”⁶⁰ Gibbons characterized himself as the “only candidate” who wanted to make it harder to raise taxes and who had actually attempted to stop the growth of taxes.⁶¹ In his 1993 testimony and in his 1994 gubernatorial campaign, Gibbons manifested an antithetical attitude toward all forms of taxes, both new and existing.

Nevadans overwhelmingly voted for Gibbons’s ballot question, garnering over 78 percent support in 1994.⁶² However, Gibbons was not nearly as popular as the initiative. He lost against the incumbent governor by over ten points.⁶³ The same question was placed on the 1996 Nevada ballot and again passed with overwhelming support,⁶⁴ garnering over 70 percent of the vote.⁶⁵

As passed, the supermajority provision added to the Nevada Constitution reads as follows:

Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each House is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.⁶⁶

The supermajority amendment was inserted as Subsection 2 of Article 4, Section 18 of Nevada’s constitution.⁶⁷ Subsection 1 of that same provision, adopted in 1864,⁶⁸ provides that a “majority of all members elected to each

⁵⁷ See NEV. SEC’Y OF STATE, 1994 PRIMARY ELECTION RETURNS, at 2 (1994).

⁵⁸ See *Nevada Gubernatorial Debate*, C-SPAN 2:10 (Oct. 7, 1994), <https://www.c-span.org/video/?60724-1/nevada-gubernatorial-debate> [<https://perma.cc/KJ3W-SLWL>].

⁵⁹ *Id.*

⁶⁰ *Id.* at 53:00.

⁶¹ *Id.* at 9:32.

⁶² See NEV. SEC’Y OF STATE, NEVADA BALLOT QUESTIONS 1994, at Question No. 11 (showing that Nevadans supported the supermajority requirement by 283,889 votes to 79,520 votes).

⁶³ See NEV. SEC’Y OF STATE, 1994 GENERAL ELECTION RETURNS, at 1.

⁶⁴ See NEV. CONST. art. 19, § 2(4) (providing that a constitutional amendment requires approval of a majority of the voters at two general elections).

⁶⁵ See NEV. SEC’Y OF STATE, STATE OF NEVADA BALLOT QUESTIONS 1996, at Question No. 11 (showing that Nevadans supported the supermajority requirement by 301,382 votes to 125,969 votes). Interestingly, Gibbons ran alongside the 1996 ballot question again—this time for U.S. Congress. See NEV. SEC’Y OF STATE, 1996 OFFICIAL STATE OF NEVADA GENERAL ELECTION RETURNS, at 2. Gibbons won this election and became the U.S. Congressman for Nevada’s Second Congressional District. *Id.*

⁶⁶ NEV. CONST. art. 4, § 18(2).

⁶⁷ *Id.* (a section of the constitution setting out the parameters for the passage of legislation).

⁶⁸ Under the traditional parliamentary rule, if a quorum of members is present in a legisla-

house is necessary to pass every bill or joint resolution.”⁶⁹ Before 1996, the simple majority rule applied to all legislation.⁷⁰ However, with the adoption of Subsection 2, the simple majority rule no longer applies to legislation increasing revenue.

The language of the amendment is broad and sweeping. The use of the phrase “increases any public revenue in any form” makes the applicability of the provision far-reaching.⁷¹ The constitutional amendment not only applies to taxes but to any increase in revenue whether through taxes, fees, or assessments.

Before the adoption of the Gibbons Antitax Initiative, the Nevada Constitution already placed significant conditions on the state’s budget. The constitution requires the legislature to fully fund all public education⁷² and to enact a balanced budget.⁷³ With the addition of the supermajority requirement for revenue increases, the interplay between the supermajority requirement and preexisting constitutional provisions was enigmatic. What would happen if the legislature needed to increase taxes to fully fund education and to enact a balanced budget, yet there was not a supermajority for such a tax increase? Such a question became the subject of litigation in 2003.⁷⁴

C. Challenging the Constitutionality of the Supermajority Requirement

By 2003, with the supermajority provision in full effect, the fiscal situation in Nevada was teetering on a crisis.⁷⁵ The nation had just weathered a recession and Nevada’s tourism-driven economy had been negatively affected by the long-term aftermath of 9/11.⁷⁶ Fiscal pressures were slowly building.⁷⁷ There was a growing need to diversify Nevada’s educational opportunities as well as to fund other services and facilities.⁷⁸

tive house, a simple majority of the quorum is sufficient for the final passage of bills by the house, unless a constitutional provision establishes a different requirement. *See* PAUL MASON, MASON’S MANUAL OF LEGISLATIVE PROCEDURE FOR LEGISLATIVE AND OTHER GOVERNMENTAL BODIES § 510 (1953). This traditional parliamentary rule is followed by each House of Congress that may pass bills by a simple majority of a quorum. *See* *United States v. Ballin*, 144 U.S. 1, 6 (1892). The Framers of the Nevada Constitution rejected the traditional parliamentary rule by providing in Article 4, Section 18 that “a majority of all the members elected to each House shall be necessary to pass every bill or joint resolution.” NEV. CONST. art. 4, § 18(1) (emphasis added).

⁶⁹ NEV. CONST. art. 4, § 18(1).

⁷⁰ *Assemb. J. Res. No. 2, 1975 Leg.*, (Nev. 1973).

⁷¹ NEV. CONST. art. 4, § 18(2).

⁷² NEV. CONST. art. 11, § 6.

⁷³ NEV. CONST. art. 9, § 2(1).

⁷⁴ *See Guinn I*, 71 P.3d 1269, 1274 (Nev. 2003).

⁷⁵ *Johnson*, *supra* note 13, at 498.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

Then-Nevada Governor Kenny Guinn, a Republican, submitted his budget to the legislature for approval.⁷⁹ His proposal included state spending increases as well as tax increases.⁸⁰ The legislature, however, only approved appropriations that could be covered by Nevada's then-existing tax structure.⁸¹ None of the approved appropriations were for K-12 education; no new taxes were approved.⁸² The governor called two separate special sessions of the legislature in an effort to avoid a constitutional impasse.⁸³ Yet, on both occasions, there was only simple-majority support in both chambers for school appropriations and for increasing taxes by the amount needed to fund those school appropriations.⁸⁴ There was not a two-thirds supermajority.⁸⁵

The Governor filed a writ of mandamus to the Nevada Supreme Court.⁸⁶ The Governor asked the court to (1) "find the Legislature and its members in violation of their constitutional duties," and (2) "direct the Legislature and its members to . . . provide sufficient revenues" for education appropriations.⁸⁷

The Nevada Supreme Court accepted review and issued its *Guinn I* opinion on the issue.⁸⁸ The court found that the two-thirds supermajority requirement was "[a]t the heart of this case" and that the "conflict among several provisions of the Nevada Constitution" created a constitutional crisis in the legislature.⁸⁹ The court ordered the legislature to fulfill its obligations under the Nevada Constitution by raising sufficient revenues to fund education while maintaining a balanced budget.⁹⁰ As to the tension between the constitutional provisions, the court held that the "procedural [supermajority] requirement must give way to the substantive . . . constitutional mandate[s] to fund public education" and to enact a balanced budget.⁹¹ Accordingly, the court ordered the legislature to proceed expeditiously under simple majority rule.⁹² The Nevada Supreme Court's opinion garnered significant attention and ridicule.⁹³

⁷⁹ *Id.* at 493.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Guinn I*, 71 P.3d 1269, 1274 (Nev. 2003).

⁸⁹ *Id.* at 1272, 1274.

⁹⁰ *Id.* at 1270.

⁹¹ *Id.* at 1272.

⁹² *Id.*

⁹³ See, e.g., *Justices' 'Bold Step' Signals End to Deadlock*, L.V. SUN (July 11, 2003, 11:05 AM), <https://lasvegassun.com/news/2003/jul/11/justices-bold-step-signals-end-to-deadlock/> [<https://perma.cc/56FR-3YSY>] (finding that a local group "Nevadans for Tax Restraint" was pursuing a recall of the six justices who endorsed the *Guinn I* opinion in addition to a referendum to toss out any tax plan that is approved). This Note does not address the merits of the

Weeks after *Guinn I*, the state legislature passed by *simple majority* a bill that fully funded education, balanced the budget, and increased taxes by \$788 million.⁹⁴ “The Speaker of the Assembly gavelled the bill passed” and ended the legislative session.⁹⁵ More litigation ensued and came before the Nevada Supreme Court⁹⁶ and the United States Supreme Court⁹⁷—yet nothing came of the litigation. The supermajority requirement emerged from its first legal challenge intact but hobbling, weakened, and possibly subject to circumvention. The supermajority requirement would not be challenged in court until over a decade later when the legislature, again, faced a legislative impasse.

II. THE *SETTELMAYER* CASE: THE SCOPE OF THE SUPERMAJORITY REQUIREMENT IN QUESTION

Just two months before the commencement of the 2019 legislative season, Nevada’s political environment had shifted favorably for the Democrats.⁹⁸ In the 2018 November election, the Democrats made significant gains in the state legislature in what some called the “Nevada blue wave.”⁹⁹ Fueled by backlash to then-President Donald Trump, the Democrats not only maintained majorities in both chambers of the legislature but made gains in both as well.¹⁰⁰ Democrats now had more than a two-thirds supermajority in the Assembly.¹⁰¹ The dynamics in the senate were of particular interest. The Republicans lost two state senate seats in 2018, leaving the Republicans with eight seats and the

Guinn I decision, as there has already been significant discussion and analysis of this topic. Compare Nevada’s *Judicial Dice-Throwers*, WALL ST. J.: OP. (July 15, 2003, 12:01 AM), <https://www.wsj.com/amp/articles/SB10582275508842800> [<https://perma.cc/E4NK-NCLN>] (stating that “the quickie divorce[s], legalized prostitution and gambling” associated with Nevada are “downright respectable” compared to the Nevada Supreme Court’s *Guinn I* decision), with Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary’s Role as Helpful Arbiter of Conflict*, 4 NEV. L.J. 518, 520 (2004) (defending the *Guinn I* opinion as an example of a court rationally “attempting to assist coordinate branches of government . . . in resolving pressing and divisive issues”).

⁹⁴ See generally *Guinn I*, 71 P.3d 1269, 1269 (Nev. 2003); Johnson, *supra* note 13, at 494.

⁹⁵ Johnson, *supra* note 13, at 494.

⁹⁶ *Guinn II*, 76 P.3d 22, 33 (Nev. 2003) (holding that the petition for rehearing was “moot”).

⁹⁷ *Id.*, cert. denied, 124 S. Ct. 1662 (2004).

⁹⁸ See Michelle L. Price, *Democrats Win US Senate, Governor in Nevada ‘Blue Wave,’* ASSOCIATED PRESS (Nov. 7, 2018), <https://apnews.com/article/bd37253e26ca4207942416910dc7da1f> [<https://perma.cc/HBB5-PLKJ>]; Megan Messerly & Riley Snyder, *Democrats Expand Legislative Majorities, with Chance at First Female-Majority Legislature*, NEV. INDEP. (Nov. 7, 2018, 8:34 AM), <https://thenevadaindependent.com/article/democrats-expand-legislative-majorities-with-chance-at-first-female-majority-legislature> [<https://perma.cc/Y38D-KN WG>].

⁹⁹ See sources cited *supra* note 98.

¹⁰⁰ See Messerly & Snyder, *supra* note 98.

¹⁰¹ *Id.*

Democrats with thirteen.¹⁰² So, the Democrats were one vote shy of a two-thirds supermajority in the senate.

After the Democrats' triumphant win in 2018, Nevada's 2019 legislative season opened with newly elected Governor Sisolak's State of the State Address.¹⁰³ In his address, the Governor stated twice that his balanced budget proposal did "not contain any new taxes."¹⁰⁴ His proposals were to be paid through the *current* revenue structure.¹⁰⁵ As the legislature worked through the 2019 budget, an issue arose as to whether the supermajority requirement touched on the legislature's ability to extend *current, already existing* revenue increases.

A. SB 542 & SB 551: Legislation Not Quite Super Enough

Hundreds of bills were introduced and passed in the 2019 legislative season.¹⁰⁶ Yet, two bills became the center of political and legal dispute. All the Democrats in both chambers voted to pass Senate Bill (SB) 542¹⁰⁷ and SB 551.¹⁰⁸ All Republicans voted against the bills, meaning that the bills were one vote shy of a two-thirds supermajority in the senate.¹⁰⁹

SB 542 was a one-sentence bill that extended the imposition of a one-dollar DMV technology fee until June of 2022, which amended a June 2020 sunset provision.¹¹⁰ SB 551 was a bill that repealed NRS 360.203.¹¹¹ Before its repeal, NRS 360.203 required the Economic Forum under the Department of Taxation to calculate the Commerce Tax,¹¹² Modified Business Tax,¹¹³ and Bank Branch Excise Tax¹¹⁴ and compare those revenues with what the Forum had previously

¹⁰² *Id.*

¹⁰³ *Governor Steve Sisolak: State of the State Address*, NV.GOV (Jan. 16, 2019), https://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/Press/2019_Images/Sisolak_SOTS.pdf [<https://perma.cc/PW6S-335F>].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See Assembly Bills, 80th (2019) Session (Legacy Listing)*, NEV. LEGISLATURE, <https://www.leg.state.nv.us/Session/80th2019/Reports/BillsListLegacy.cfm/> [<https://perma.cc/6WLD-XYSB>] (listing the over 500 Assembly Bills introduced in the 2019 legislative session).

¹⁰⁷ *See* S.B. 542, 2019 Leg., 80th Sess. (Nev. 2019) (outlining the legislative history of SB 542).

¹⁰⁸ *See* S.B. 551, 2019 Leg., 80th Sess. (Nev. 2019), (outlining the legislative history of SB 551).

¹⁰⁹ *See* Nev. S.B. 542; *see also* Nev. S.B. 551.

¹¹⁰ Nev. S.B. 542.

¹¹¹ Nev. S.B. 551.

¹¹² The Commerce Tax is calculated under NRS 363C. *See* NEV. REV. STAT. § 363C.300 (2019).

¹¹³ The Modified Business Tax is calculated under NRS 363A.130. *See* NEV. REV. STAT. § 363A.130 (2019).

¹¹⁴ The Bank Branch Excise Tax is calculated under NRS 363B.110. *See* NEV. REV. STAT. § 363B.110 (2019).

estimated as needed for the fiscal year.¹¹⁵ If the Forum underestimated revenues for a given fiscal year, then nothing happened under the provision.¹¹⁶ However, if the Forum overestimated revenue in proportion to collection by more than 4 percent, the statute allowed the department to recalculate future tax rates,¹¹⁷ resulting in a potential future tax decrease.¹¹⁸

Republican lawmakers contended that both bills fell in the crosshairs of the supermajority requirement because both had the effect of creating, generating, and increasing public revenue.¹¹⁹ Nonetheless, SB 542 and SB 551 were gavelled as passed, and the Governor signed the bills into law.¹²⁰ All eight Nevada Republican Senators, along with three Nevada companies, (“the plaintiffs”) sued the legislature and the Governor (“the defendants”).¹²¹

B. *In the District Court*

About a month after the conclusion of the legislative session, the plaintiffs filed a formal complaint in July of 2019 in the First Judicial District of Nevada.¹²² The plaintiffs argued that by extending the one-dollar technology fee for DMV transactions, SB 542 created, generated, and increased public revenue from July 2020 through June 2022.¹²³

The plaintiffs argued that SB 551 and its repeal of NRS 360.203 also created, generated, and increased public revenue because the Nevada Department of Taxation had previously announced a reduction of tax rates under the now-repealed statute.¹²⁴ The plaintiffs pointed out that the Department of Taxation announced in October 2018 that it had overestimated by more than 4 percent the expected Modified Business Tax and the Bank Excise Tax in combination with revenue from the Commerce Tax.¹²⁵ Accordingly, the department was set to reduce payroll tax rates for 2019 as instructed under NRS 360.203.¹²⁶ However, with the repeal of NRS 360.203, those tax rates were to remain perma-

¹¹⁵ NEV. REV. STAT. § 360.203(1)–(2) (2019).

¹¹⁶ NEV. REV. STAT. § 360.203 (2019).

¹¹⁷ *Id.* at (2).

¹¹⁸ *Id.*

¹¹⁹ See sources cited *infra* notes 123–24.

¹²⁰ S.B. 542, 2019 Leg., 80th Sess. (Nev. 2019) (indicating that the bill passed the senate on May 27, 2019, and was approved by the governor on June 5, 2019); S.B. 551, 2019 Leg., 80th Sess. (Nev. 2019) (indicating that the bill as amended passed the senate on June 3, 2019, and was approved by the governor on June 12, 2019).

¹²¹ Complaint at 1, *Settelmeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. July 19, 2019). There were also numerous other defendants, including Democratic state senators in their official capacity and other state executive agencies. See *id.*

¹²² *Id.*

¹²³ *Id.* at 6–7.

¹²⁴ *Id.* at 7–8.

¹²⁵ *Id.*

¹²⁶ *Id.* at 8.

nently fixed at rates already outlined in the applicable statutes.¹²⁷ The plaintiffs argued that this had the effect of creating, generating, and increasing public revenue because SB 551 eliminated a scheduled reduction in tax rates and, thereby, the 2019 applicable rate was set to a higher rate than scheduled.¹²⁸

The plaintiffs asserted that SB 542 and SB 551 could only be passed by a two-thirds supermajority in both chambers of the legislature.¹²⁹ The plaintiffs sought declaratory relief such that the court should declare SB 542 and SB 551 unconstitutional and sought to enjoin the state from enacting or enforcing either bill.¹³⁰

The defendants countered by arguing that SB 542 and SB 551 did not create, generate, or increase public revenue.¹³¹ Both parties moved for summary judgment.¹³² The district court entered judgement in favor of the plaintiffs and held that SB 542 and SB 551 were unconstitutional.¹³³ The defendants appealed to the Nevada Supreme Court.¹³⁴

C. *In the Nevada Supreme Court*

In their appeal to the Nevada Supreme Court, the defendants first argued that “create[], generate[], or increase[],” as used in the supermajority requirement, plainly meant to “bring[] into existence,” enlarge, or produce.¹³⁵ The defendants reasoned that SB 542 did not “bring into existence” or enlarge fees but merely maintained and extended already existing DMV fees.¹³⁶

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 9.

¹³⁰ *Id.* at 11–13.

¹³¹ Legislative Defendants’ Motion to Dismiss at 7, 10, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Sept. 16, 2019).

¹³² Plaintiffs’ Reply in Support of Motion for Summary Judgment, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Sept. 4, 2020); Legislative Defendants’ Reply in Support of Counter-Motion for Summary Judgment, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Sept. 15, 2020).

¹³³ Order After Hearing at 11, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Oct. 7, 2020). The district court also addressed the issue of whether the plaintiffs were entitled to attorney’s fees. *Id.* at 10. The district court ruled against the plaintiffs on this issue. *Id.* The plaintiffs appealed the attorney’s fees issue to the Nevada Supreme Court, alongside the bills’ constitutionality. *See* Plaintiff’s Notice of Appeal at 1–2, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Oct. 23, 2020). As a result, the defendants on appeal were both appellants and cross-respondents and the plaintiffs were respondents and cross-appellants. However, this Note focuses on the interpretation of the supermajority provision and not on the issue of attorney’s fees. Accordingly, this Note purposefully excludes discussion of the attorney’s fees issue.

¹³⁴ *See* Nevada Legislature’s Case Appeal Statement at 1–2, *Settlemeyer v. Nevada*, No. 19-OC-00127-1B (Nev. Dist. Ct. Oct. 9, 2020).

¹³⁵ Appellant/Cross-Respondent Nevada Legislature’s Opening Brief at 28, *Legislature of the State of Nevada v. Settlemeyer*, No. 19-OC-00127-1B (Nev. Dist. Ct. Mar. 22, 2021).

¹³⁶ *Id.* at 30.

Regarding SB 551, the defendants argued that the bill did not create, generate, or increase public revenue because it did not change—it maintained—the *existing* computation bases and legally operative rates already in effect.¹³⁷ The defendants asserted that any future reduced rates that were eliminated by SB 551 had not taken effect, so the statute did not generate or increase any *new* revenue.¹³⁸

The defendants leaned heavily on the history of the supermajority provision, arguing that the intent of the provision was to require a supermajority to increase *new* revenue only.¹³⁹ The defendants outlined Gibbons's role in the enactment of the provision and claimed that Gibbons intended to make it harder to turn to “new sources of revenue” but did not intend to “impair” already existing revenue streams.¹⁴⁰

In May 2021, the Nevada Supreme Court issued its opinion interpreting the supermajority provision as applied to SB 542 and SB 551.¹⁴¹ The court started its opinion with its method of interpretation—it would not look beyond the plain meaning of the supermajority provision because the provision's language was clear and unambiguous.¹⁴² This spelled trouble for the defendants, as much of their argument rested upon extrinsic evidence as to the “intent” behind the supermajority provision.¹⁴³ The court found that the use of “create” and “generate” as used in the provision plainly encompassed a bill that “results in the State receiving more public revenue than it would have realized without [the bill].”¹⁴⁴ The court also found that the use of the word “any” indicated that the supermajority provision applied to all bills that provided the state with more public revenue “at any time.”¹⁴⁵

In applying this interpretation to SB 542 and SB 551, the court found that both bills were unconstitutional because they were not passed by a supermajority-

¹³⁷ *Id.* at 35–36.

¹³⁸ *Id.* at 41.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 41–42. The defendants supported their contention that Gibbons, in trying to enact the supermajority requirement, intended only to affect *new* sources of revenue. *See id.* at 39–41 (citing quotes from Gibbons's testimony in support of AJR 21). However, the defendants' support is cherry-picked and does not accurately depict all the extrinsic evidence of Gibbons's intent for the supermajority requirement. As discussed more thoroughly in Section I.B *supra*, Gibbons was clearly concerned about “wasteful” and “inefficient” government spending and wanted to stop any form of increased taxation—whether existing or new. I am not inferring that the defendants acted in bad faith in making their argument, but rather I want to provide a fuller picture as to the extrinsic evidence of Gibbons's intent for the supermajority requirement.

¹⁴¹ *Legislature of the State of Nevada v. Settelmeier*, 486 P.3d 1276, 1281 (Nev. 2021).

¹⁴² *Id.* at 1280.

¹⁴³ *See supra* notes 139–40 and accompanying text.

¹⁴⁴ *Settelmeier*, 486 P.3d at 1280–81.

¹⁴⁵ *Id.* at 1281.

ty in the state senate.¹⁴⁶ The court observed that by extending the one-dollar DMV fee, SB 542 raised about \$7 million each year that the fee was extended, and the state would not have had such an increase in revenue without SB 542.¹⁴⁷ Similarly, the court found that SB 551 generated \$98.2 million in revenue because the bill eliminated a planned reduction in payroll taxes for the year 2019.¹⁴⁸ Thus, both bills were subject to supermajority passage in both legislative chambers because the state would not have received the revenue increases but for the passage of the bills.¹⁴⁹

The court rejected the defendants' arguments for two reasons. First, the court rejected the defendants' assertion that the supermajority provision only applies to increases in "new" revenue, because to do so would have required the court to read limiting language into the constitutional provision.¹⁵⁰ Second, the court rejected the defendants' analysis of the provision's "purpose[]" and "intent" because the provision's language spoke clearly and unambiguously.¹⁵¹

Since the *Settelmeyer* opinion, there have been renewed calls for repealing the supermajority requirement. The ball is no longer in the court's hands, however. The Nevada voters will likely decide the fate of the supermajority provision.

III. AFTERMATH OF *SETTELMAYER*: SHOULD NEVADA RECONSIDER THE SUPERMAJORITY REQUIREMENT

Most of the commentary on supermajority requirements for revenue increases is sectarian—viewing such requirements as either totally bad and worthy of complete repeal or totally good and worthy of unexclusive application.¹⁵² There are few who have taken a nuanced approach to the topic.¹⁵³ Considering that Nevada's political landscape makes a full repeal of the supermajority requirement extremely unlikely, this Note takes the road less traveled and offers

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1281–82.

¹⁵¹ *Id.*

¹⁵² Compare MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, SIX REASONS WHY SUPERMAJORITY REQUIREMENTS TO RAISE TAXES ARE A BAD IDEA 1–2 [hereinafter SIX REASONS], <https://www.cbpp.org/research/six-reasons-why-supermajority-requirements-to-raise-taxes-are-a-bad-idea/> [<https://perma.cc/2QV8-5KWQ>] (outlining why supermajority requirements for tax or revenue increases lead to bad policy), with Dean Stansel, *Supermajority: A Super Idea*, CATO INST. (Apr. 15, 1998), <https://www.cato.org/commentary/supermajority-super-idea/> [<https://perma.cc/FPE3-WV5H>] (arguing that supermajority requirements for tax increases are a "no-brainer").

¹⁵³ *But cf.* Roxanne Bland & Tax Notes, *Are State Supermajority Requirements to Enact New Taxes a Good Idea?*, FORBES (Apr. 10, 2020, 10:53 AM), <https://www.forbes.com/sites/taxnotes/2020/04/10/are-state-supermajority-requirements-to-enact-new-taxes-a-good-idea/> [<https://perma.cc/95ZW-QFJB>] (outlining the pros and cons of supermajority requirements).

alternative solutions that factor in the problems posed by the supermajority requirement, as well as the policy merits of the requirement.

A. *Nevada's Political Landscape: Is a Repeal Even Viable*

The Settlemeyer decision has placed doubts in the legitimacy of the supermajority requirement.¹⁵⁴ However, a preliminary question is whether a constitutional repeal is a politically feasible solution. It is futile to engage in a policy discussion centered around repealing a provision that is unlikely to be repealed.

In order to repeal the constitutional provision, the Nevada voters must approve by simple majority the repeal at least once, possibly twice, depending on the path taken.¹⁵⁵ Pursuing a constitutional repeal would be a politically risky move. Nevada Democrats, who have shown the most willingness to pursue a repeal, could find themselves in a lose-lose situation if they pursue a likely-to-fail endeavor that could hand their political opponents a favorable campaign issue.¹⁵⁶ Despite recent election wins for Democrats in the state, Nevada is still considered a swing state, such that Republicans and Democrats have similar levels of support among Nevada voters.¹⁵⁷ Even in 2018, where political prospects were highly favorable for Democrats, the Democrat gubernatorial candidate failed to break 50 percent support among Nevadans.¹⁵⁸

Considering these political dynamics, the Democrats could face an uphill battle in convincing a majority to support a complete repeal.¹⁵⁹ Many Nevadans likely view the supermajority requirement as protecting their personal tax bur-

¹⁵⁴ See Girnus & Lyle, *supra* note 5.

¹⁵⁵ There are two ways to amend the Nevada Constitution, and both require voter input. One option would be to garner a simple majority in both chambers of the legislature and then amass majority support among the Nevada voters in one popular election. See NEV. CONST. art. 16, § 1(1). The second option would be to compile majority support among the Nevada voters in two separate elections—as Gibbons successfully did in passing the supermajority requirement. See NEV. CONST. art. 19, § 2(4).

¹⁵⁶ See Girnus & Lyle, *supra* note 5.

¹⁵⁷ See Jessica Pearce Rotondi, *What Are Swing States and Why Are They Critical in US Elections?*, HIST. (Oct. 7, 2020), <https://www.history.com/news/swing-states-presidential-elections> [<https://perma.cc/SQ79-44UD>]; *Swing States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/swing-states> [<https://perma.cc/N3KC-8X45>].

¹⁵⁸ *Nevada Gubernatorial Election, 2018*, BALLOTPEdia, https://ballotpedia.org/Nevada_gubernatorial_election_2018 [<https://perma.cc/8YTN-CD34>]. Similarly, President Joe Biden barely broke 50 percent in Nevada in the 2020 presidential election. See *Nevada Election Results 2020*, NBC NEWS, <https://www.nbcnews.com/politics/2020-elections/nevada-results> [<https://perma.cc/FWC4-AYK5>] (showing that Biden won Nevada by merely 50.1 percent).

¹⁵⁹ See Girnus & Lyle, *supra* note 5. Even in the Democrat stronghold of California, the voters recently supported requiring a two-thirds supermajority for certain tax increases, which further supports the reality that a full repeal would be a tough mountain to climb in Nevada. See *California Proposition 26, Supermajority Vote to Pass Certain New Taxes and Fees (2010)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_26_Supermajority_Vote_to_Pass_Certain_New_Taxes_and_Fees_\(2010\)](https://ballotpedia.org/California_Proposition_26_Supermajority_Vote_to_Pass_Certain_New_Taxes_and_Fees_(2010)) [<https://perma.cc/YV8C-HYB2>].

den from multiplication and would not jump on the prospect of making it easier for lawmakers to raise taxes.¹⁶⁰ Most voters do not consider the long-term, large-scale implications of a given policy but rather consider how policy changes will directly and immediately impact their lives.¹⁶¹

University of Nevada Las Vegas Political Science Professor David Damore opined that Nevada Democrats would be ill-advised to pursue a repeal because “such an effort would fail” and would hand Republicans a “big campaign issue” that would garner sympathy and support for Republican candidates.¹⁶² Nevada Democrats themselves have admitted that a complete repeal would “be a difficult sell to the public.”¹⁶³

Therefore, the road to repeal is blocked. Republicans would not seek a repeal, and considering the potential political ramifications of such a move, Democrats do not have the appetite for making the case for repealing it either. The most viable option is to seek alternative solutions to the problems posed by the supermajority requirement. However, before doing so, it is important to consider the policy landscape and chart a course forward that factors in the merits and impediments of the supermajority requirement.

B. Nevada’s Policy Landscape: Is the Supermajority Requirement Good for Nevada

There are three policy landscapes to consider when thinking about the merits of Nevada’s supermajority requirement: (1) trust in elected officials to act in the public’s interest, (2) bipartisanship as a policy goal, and (3) the legislature’s ability to respond to budgetary needs.

1. Trust in Elected Officials

Trust in elected officials is at record lows. Pew Research in 2019 found that elected officials are the most distrusted professionals in the United States—even below business leaders and journalists (who also scored low).¹⁶⁴ Pew Research also reported that over 70 percent of Americans believe that politicians lose touch with their constituents quickly, do not care what their constituents think, and put their own interests first.¹⁶⁵

¹⁶⁰ See *Voters Never Smile upon Tax Hikes*, *supra* note 1.

¹⁶¹ *Id.*; Girmus & Lyle, *supra* note 5.

¹⁶² Girmus & Lyle, *supra* note 5.

¹⁶³ *Id.*

¹⁶⁴ LEE RAINIE ET AL., PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA 6, <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/> [<https://perma.cc/8HJQ-Y7BQ>].

¹⁶⁵ PEW RSCH. CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 72, <https://www.pewresearch.org/politics/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/> [<https://perma.cc/38TG-D3DS>].

A recent study compared the political preferences of the general public with those of economic elites and interest groups.¹⁶⁶ The study found that when involved in the lawmaking process, special interests and economic elites almost entirely wiped out the general public's influence on policy changes.¹⁶⁷ The study found that "average citizens only get what they want if economic elites or interest groups also want it."¹⁶⁸ This is a disturbing trend in our democracy. Accordingly, supermajority requirements can protect voters from unresponsive, apathetic politicians who are acting contrary to the voters' interests. A supermajority requirement by definition requires more buy-in and consensus in the legislature, thereby increasing the probability that a minority voice can halt legislation that is unpopular with voters yet has evaded public attention.

However, this is only one side of the story. On the other side, supermajority requirements can serve as a welcome mat to special interests who desire to protect unfair tax breaks from repeal.¹⁶⁹ As certified in *Settelmeyer*, repealing a tax break in Nevada is considered a revenue increase and is subject to the supermajority requirement.¹⁷⁰ This means that costly deductions, credits, and other expenditures that benefit only a handful of corporations or individuals are difficult to get rid of.¹⁷¹ Special interests can easily stop the elimination of tax loopholes by mustering a small minority in the legislature to block the will of the majority.¹⁷²

The fundamental problem here is that voters perceive politicians as untrustworthy and acting contrary to the public's interest—whether it is a political minority acting on behalf of special interests or a majority acting contrary to the will of their voters. A constitutional contraption that requires a supermajority for revenue increases can protect voters from legislative majorities trying to sneak past the will of the voters. However, this constitutional contraption should also have built-in exceptions that allow the legislature to eliminate unfair loopholes by simple majority. I discuss this dual consideration further in the solutions offered *infra* Section III.C.

2. *Bipartisanship as a Policy Goal*

Defenders of supermajority requirements for revenue increases often cite bipartisanship as an important and beneficial result of such requirements.¹⁷³ The rationale is that if "elected representatives want to take more money out of

¹⁶⁶ Andrew Prokop, *Study: Politicians Listen to Rich People, Not You*, VOX (Jan. 28, 2015, 4:15 PM), <https://www.vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained> [<https://perma.cc/SQ2E-U4LS>].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See LEACHMAN ET AL., *SIX REASONS*, *supra* note 152, at 5.

¹⁷⁰ See *supra* notes 146–48 and accompanying text.

¹⁷¹ See LEACHMAN ET AL., *SIX REASONS*, *supra* note 152, at 1.

¹⁷² *Id.* at 5.

¹⁷³ See Stansel, *supra* note 152.

their constituents' pockets, they [should have] to reach a broader consensus before they can do so."¹⁷⁴ Under this rationale, however, it is unclear whether amassing a broader consensus actually leads to better legislation or better policy. This rationale merely concludes that bipartisanship and consensus building are policy ends in themselves worth seeking.

Bipartisanship, unfortunately, has become a tired buzzword that is often uttered. But its merit is rarely fleshed out. The benefits of bipartisanship are frequently overstated, undefined, and logically incoherent. First, it is unclear from a policy standpoint why supermajorities are appropriate in one lawmaking context but not in another. Why should a simple majority be sufficient for a change in healthcare policy but not for a revenue increase? Additionally, because the electorate has shown support for bipartisan lawmaking, politicians often cater their rhetoric toward appearing "bipartisan" and moderate.¹⁷⁵ Yet, in reality, politicians are often manipulating the public into believing that they are bipartisan policymakers without defining what bipartisanship in fact means or justifying what it accomplishes.¹⁷⁶

Politicians often cloak legislation in a veneer of bipartisanship in order to legitimize what very well might be bad policy. For example, an analysis of 434,266 floor speeches in United States Congress reveals that most bipartisan posturing happens for bills that gain trivial minority support.¹⁷⁷ This allows representatives to give "the impression they are bipartisan while simultaneously voting to advance their party's agenda."¹⁷⁸ Bipartisanship on a bill does not magically turn the bill into good legislation. The substance of a bill determines its merit, not how many votes the bill gets.

A final problem with bipartisanship as a policy rationale is that it seeks an ambiguous, boundless goal. If the end sought is a broader consensus, then why stop at a two-thirds consensus? Why not require a nine-tenths consensus or a full consensus? It is also unclear why a simple majority is not a large enough consensus. The overarching issue here is that bipartisanship is often held up as the holy grail of political attainment without due justification.¹⁷⁹ This Note seeks to avoid these political platitudes by actually fleshing out the merits of consensus building and bipartisanship in the context of a supermajority requirement.

I suggest looking at bipartisanship as a means to an end rather than a policy end in itself. Bipartisanship serves a useful purpose only because of the results

¹⁷⁴ *Id.*

¹⁷⁵ See Sean J. Westwood, *The Partisanship of Bipartisanship: How Representatives Use Bipartisan Assertions to Cultivate Support*, 44 POL. BEHAV. 1411, 1411–12 (2022).

¹⁷⁶ *Id.* at 1412. For example, a politician could add a single lawmaker from the opposition to a legislative coalition and then declare the action "bipartisan." The point here is that bipartisanship is prone to manipulation and is often manipulated by lawmakers.

¹⁷⁷ *Id.* at 1411.

¹⁷⁸ *Id.* at 1412.

¹⁷⁹ *Id.* at 1411–12.

that emanate from consensus building. In the case of Nevada's supermajority requirement, there are at least two benefits that could result from increased bipartisanship in Nevada's budgetary process.¹⁸⁰

First, recent studies have shown that if there is a bipartisan coalition supporting a bill, the public has more confidence and trust in that bill and in the lawmakers passing the bill.¹⁸¹ The public also tends to hold a more favorable view of the lawmaking body under these circumstances.¹⁸² Legislators working on bipartisan legislation are viewed as "listening to the views of voters" and as "less self-interested."¹⁸³ Restoring public trust in Nevada should be an important priority, especially considering that recent data has shown that barely 50 percent of Nevadans trust their state government—one of the lowest rates in the United States as compared to other states having over 70 percent of residents who trust in their state governments.¹⁸⁴

Nevada's supermajority requirement increases the opportunities for bipartisan legislation. If Nevada lawmakers were to embrace bipartisanship in the budget process and effectively publicize the undertaking, the public would likely have more confidence and trust in how taxpayer dollars are spent. Increased trust in state government spending could also help Nevada agencies succeed in their missions, as increased government trust leads to greater compliance with regulators, participation in programs, and engagement with government.¹⁸⁵ For example, research has found that where there is greater trust in government, especially trust in government spending efforts, there is greater tax compliance in the community.¹⁸⁶

The second benefit is that bipartisanship in the budget process may have the effect of moderating and tempering partisan legislation.¹⁸⁷ When a larger

¹⁸⁰ Throughout my discussion of bipartisanship, I purposefully soften my language with words like "could," "can," and "may." This choice emphasizes that bipartisanship does not always deliver the benefits promised. The softened language also ensures that this Note does not oversell bipartisanship as a policy goal.

¹⁸¹ See Flannery Winchester, *Bipartisanship Improves Public Opinion of Legislators & Policy*, CITIZENS' CLIMATE LOBBY (Feb. 13, 2018), <https://citizensclimatelobby.org/blog/democracy/bipartisanship-improves-public-opinion-legislators-policy/> [<https://perma.cc/PG69-ABZ5>].

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Jeffrey M. Jones, *Illinois Residents Least Trusting of Their State Government*, GALLUP (Apr. 4, 2014), <https://news.gallup.com/poll/168251/illinois-residents-least-trusting-state-government.aspx#1> [<https://perma.cc/SJ72-95H4>] (reporting a 50-state Gallup poll on Americans' trust in their state governments).

¹⁸⁵ See John O'Leary et al., *Improving Trust in State and Local Government: Insights from Data*, DELOITTE (Sept. 22, 2021), <https://www.deloitte.com/xen/en/insights/industry/public-sector/trust-in-state-local-government.html> [<https://perma.cc/ZJD6-9RF5>] (outlining why increasing trust in state government is important for society).

¹⁸⁶ Antonios M. Koumpias et. al., *Trust in Government Institutions and Tax Morale*, 77 PUB. FIN. ANALYSIS 1, 2 (2021).

¹⁸⁷ See Brian R. D. Hamm, Note, *Modifying the Filibuster: A Means to Foster Bipartisan-*

consensus is required to pass a bill, the extremist elements from either political party are often the first axed from the bill.¹⁸⁸ Although the extreme political voices are often the loudest voices in the room,¹⁸⁹ the majority of the US public leans moderate in their political orientation.¹⁹⁰ Accordingly, increased bipartisanship can align legislative policy with a larger portion of the public, rather than with merely the most thunderous political voices. Similarly, Nevada's supermajority requirement for revenue increases may prevent radical budgetary shifts whenever a new party takes control of the legislative reins.¹⁹¹ This can create policy stability in the state.¹⁹²

Bipartisanship itself does hold policy merit. Nevada's supermajority requirement may lead to increased bipartisanship in the budget process, and that could lead to positive results like increased public trust and policy stability. However, it is important not to overstate the benefits of bipartisanship or view it as superior to other policy considerations. Nevada should not sacrifice all other considerations in the name of bipartisanship, as it does not hold talismanic policy value.

3. *Workability of the Supermajority Requirement*

Revenue is hard to raise in Nevada. Nevada does not have a state income tax¹⁹³ or a corporate tax.¹⁹⁴ This leaves the legislature with limited revenue streams. As discussed previously, the Nevada Constitution requires the legislature to balance its budget and fully fund education.¹⁹⁵ These constitutional requirements limit how and where money can be spent. Now with the addition of the supermajority requirement, the legislature must garner a two-thirds supermajority to pass any revenue increase.¹⁹⁶ The legislature is stymied when it

ship While Reining in Its Most Egregious Abuses, 40 HOFSTRA L. REV. 735, 735–36 (2012).

¹⁸⁸ Cf. Robert A. Levy, *Two Cheers for Filibusters*, CATO INST. (June 7, 2010), <https://www.cato.org/commentary/two-cheers-filibusters> [<https://perma.cc/ZW9T-X4SU>] (outlining how supermajority requirements restrain “tyrannical” and extreme policy changes).

¹⁸⁹ See Carrie Blazina, *Americans at the Ends of the Ideological Spectrum are the Most Active in National Politics*, PEW RSCH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/fact-tank/2022/01/05/americans-at-the-ends-of-the-ideological-spectrum-are-the-most-active-in-national-politics/> [<https://perma.cc/Y37Q-LRS3>].

¹⁹⁰ See Lydia Saad, *Americans' Political Ideology Held Steady in 2020*, GALLUP (Jan. 11, 2021), <https://news.gallup.com/poll/328367/americans-political-ideology-held-steady-2020.aspx> [<https://perma.cc/E8FV-8ED6>].

¹⁹¹ See Hamm, *supra* note 187, at 736.

¹⁹² *Id.*

¹⁹³ See Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2021*, TAX FOUND. (Feb. 17, 2021), <https://taxfoundation.org/publications/state-individual-income-tax-rates-and-brackets/> [<https://perma.cc/J9BZ-H5WD>].

¹⁹⁴ See Janelle Fritts, *State Corporate Income Tax Rates and Brackets for 2021*, TAX FOUND. (Feb. 3, 2021), <https://taxfoundation.org/state-corporate-tax-rates-2021/> [<https://perma.cc/PB7N-LJHL>].

¹⁹⁵ See *supra* notes 72–73 and accompanying text.

¹⁹⁶ NEV. CONST. art. 4, § 18(2).

comes to raising revenue for basic government obligations, like providing fundamental services to residents. As of now, Nevada is in desperate need of increased funding for fundamental services, like education and infrastructure. The state currently ranks last in the United States for overall education quality and for student educational success.¹⁹⁷ In 2018, Nevada's infrastructure received a "C" report card from the American Society of Civil Engineers, describing the state's infrastructure as "show[ing] . . . signs of deterioration [that] requires attention."¹⁹⁸

The Center for Budget and Policy Priorities also found that supermajority requirements create an "imbalance that makes it hard for lawmakers to address . . . big unmet needs in their communities, like healthcare and schools."¹⁹⁹ Nevada's constricted budget has left local governments with insufficient support from the state. For example, local Nevada municipalities are trying to fill in the budgetary gaps left by the state by increasing local fees to finance desperately needed affordable housing efforts.²⁰⁰

Nevada's highly constricted revenue stream presents particular problems during a recession. When entering a recession, a state should balance its budget with both spending cuts and tax increases.²⁰¹ However, the supermajority requirement squeezes the legislature's options for tax increases, which presses the state to balance its budgets only with spending cuts.²⁰² This tends to make a recession worse by "dampening economic activity because of employee layoffs, contract cancellations with vendors, reduced payments to businesses and nonprofits that serve the community, and more."²⁰³

This phenomenon bared true for Nevada and other supermajority states during the 2008 recession. Most states with strict supermajority requirements saw far worse job loss during the recession compared to states without supermajority restrictions.²⁰⁴ The two states with the deepest job losses during the 2008 recession—Arizona and Nevada—were the states with the broadest su-

¹⁹⁷ EdWeek Rsch. Ctr., *Quality Counts 2021: Educational Opportunities and Performance in Nevada*, EDUCATIONWEEK (Sept. 1, 2021), <https://www.edweek.org/policy-politics/quality-counts-2021-educational-opportunities-and-performance-in-nevada/2021/01> [<https://perma.cc/EMV9-V5DK>].

¹⁹⁸ NEV. SECTION AM. SOC'Y CIV. ENG'RS, NEVADA 2018 INFRASTRUCTURE REPORT CARD 3–5, 8 (2018) (indicating that Nevada needs to increase spending on infrastructure in order to improve the state's "grade").

¹⁹⁹ Bland & Tax Notes, *supra* note 153.

²⁰⁰ See Michael Lyle, *Siding with Industry yet Again, Lawmakers Reject Affordable Housing Measures*, NEV. CURRENT (Apr. 13, 2021, 6:29 AM), <https://www.nevadacurrent.com/2021/04/13/siding-with-industry-yet-again-lawmakers-reject-affordable-housing-measures/> [<https://perma.cc/D4YE-74ZS>].

²⁰¹ See Bland & Tax Notes, *supra* note 153.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See LEACHMAN ET AL., SIX REASONS, *supra* note 152, at 7.

permajority restrictions.²⁰⁵ Nevada lost 13 percent of its jobs during the recession, the largest loss in the United States.²⁰⁶ In 2008, Nevada had the highest foreclosure rate in the country, and loan modifications offered to borrowers forced many to turn to bankruptcy as their only option.²⁰⁷ Nevada's road conditions also went from being one of the top-ranked before 2008 to being ranked as "deteriorating" because of "tax revenues plummet[ing]" from the 2008 crisis.²⁰⁸

Nevada's supermajority requirement presents a mixed bag of policy considerations. On the one hand, the requirement serves as a constitutionally mandated consensus builder and protector of the taxpayer from untrustworthy politicians. On the other hand, the requirement continues to squeeze the state's budgetary options and serves as an outlet for powerful special interests to continue feeding off of unfair tax loopholes. This medley of policy considerations confirms what was already hinted at by Nevada's political landscape: that a compromise is in Nevada's best interest. I argue the best path forward is a hybrid approach that maintains the supermajority requirement for revenue increases but allows for exceptions in certain circumstances.

C. *Brokering a Compromise: Adding Rather than Taking Away*

Instead of repealing the supermajority requirement, I suggest that Nevada should amend its state constitution to include at least two exceptions to the supermajority requirement. These two amendments balance the competing policy interests by protecting Nevada taxpayers but also making it easier for the legislature to manage the state's budget. These amendments would also face a much better chance at the polls than a full repeal.

The first amendment allows the governor and the legislature to bypass the supermajority requirement and pass an increase in revenue by simple majority during an emergency. The emergency provision can only be activated when both the governor and a majority of the legislature agree on (1) the nature of the emergency, (2) the specific amount needed to fund the emergency, and (3) how to fund the emergency. Any bill or joint resolution passed under the emergency provision can only increase revenue to the extent needed to fund the emergency.

²⁰⁵ *Id.*

²⁰⁶ *Id.* It also worth noting that Nevada strained in 2003 to manage a state economic downturn, in part because of the supermajority requirement, which led to the governor filing a writ of mandamus with the Nevada Supreme Court. *See supra* notes 71–74, 82, 86 and accompanying text.

²⁰⁷ *Ground Zero of the Housing and Financial Crises, Before the S. Cong. Oversight Panel, 110th Cong. (2008)* (statements of Shelley Berkley, Congresswoman, and Linda Abrams, Counselor, NID Housing).

²⁰⁸ AM. SOC'Y CIV. ENG'RS, NEVADA 2014 INFRASTRUCTURE REPORT CARD, 1, 4 (2014) (giving Nevada's transportation a "C minus" ranking in 2014, despite Nevada having been highly ranked before the 2008 financial crisis).

The definition of “emergency” is an important element of this constitutional amendment. The proposed definition here includes fiscal and economic emergencies, as that fits the policy of giving the legislature flexibility to increase revenue during recessions. Under the proposed definition, the legislature would also be able to increase revenue by simple majority when the state is hit with a natural disaster or public health crisis. In times of crisis, time is of the essence, and, therefore, the legislature needs to act with all deliberate speed to “stop the bleeding” rather than quibble over whether a supermajority exists for the funding effort. An emergency would not include legislative disagreements or an inability to fund new or existing public programs.

This amendment would include two limiting clauses. These clauses would provide a check on the legislature’s ability to bypass the supermajority requirement. First, any bill or joint resolution passed under the emergency provision would automatically expire at the conclusion of the following calendar year of enactment and could only be extended by a two-thirds supermajority in both legislative chambers. This clause limits the legislature’s ability to enact long-term revenue changes without a supermajority. The legislature could act quickly to fund an emergency, yet still must seek a broader consensus when enacting any long-lasting tax or fee increases. If public popularity is high for a law passed under the emergency provision, a legislative minority would be motivated to join the majority to extend the law. Conversely, if a revenue increase passed under the provision is unpopular, a legislative minority would be properly incentivized to allow the revenue increase to wither out of existence.

The second limiting clause would require the legislature to garner a two-thirds supermajority for any subsequent revenue increases under the same emergency declaration. For example, if the governor and legislature decided to declare a disaster emergency and the legislature increased revenue by a simple majority in order to fund initial disaster relief efforts, the legislature could only increase revenue for subsequent relief efforts with a two-thirds supermajority. The purpose of this clause is to prohibit the legislature and the governor from continuously using the same emergency declaration to fund tangentially related programs or efforts. The legislature and the governor should not bypass the supermajority requirement at will.

In putting together the elements described above, the first proposed amendment would read as follows:

Subsection 2 shall not apply to any bill or joint resolution that creates, generates, or increases revenue if all of the following conditions are met: (1) the governor requests the General Assembly to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; (3) the General Assembly thereafter declares an emergency in accordance with the specifics of the governor’s request by a majority vote in the members elected to each House, thereafter, not fewer than two-thirds of the members elected to and serving in each house will be required for any subsequent revenue request under the same emer-

gency declaration;²⁰⁹ and (4) the bill or joint resolution exempted from subsection two may only create, generate, or increase revenues to the extent to fund the emergency as outlined by the governor. The emergency must be declared in accordance with this subsection prior to creating, generating, or increasing revenue which constitutes the emergency request. Any bill or joint resolution passed under this subsection will sunset at the conclusion of the following calendar year of the bill or joint resolution's enactment and may only be extended by not fewer than two-thirds of the members elected to each House as outlined in subsection 2.

An emergency under this subsection includes a state fiscal emergency, economic emergency,²¹⁰ disaster emergency, public health emergency, or other unforeseen emergency. An emergency does not include legislative disagreements, funding disagreements, or revenue shortfalls.²¹¹

As proposed, this amendment would have a far better chance of voter approval than a complete repeal. Voters need, and are more likely to welcome, increased government action during economic, social, or national security emergencies.²¹² Accordingly, many voters would likely welcome more legislative muscle during state emergencies. The amendment would also satisfy the palates of those concerned about tax increases because legislation passed under this amendment is either temporary or subject to the two-thirds supermajority requirement at a later time. Of course, there is never a guarantee of how the electorate will respond to a ballot provision.

The second proposed constitutional amendment is one narrowly targeted at allowing the legislature to eliminate tax deductions and loopholes by simple majority. There are two elements to this amendment. The first is that the legislature would be able to pass a bill or joint resolution that seeks to eliminate a tax, fee, or adjustment reduction by simple majority. However, under the

²⁰⁹ The Missouri Constitution was used as a model for this emergency exception. *See* MO. CONST. art. X, § 19.

²¹⁰ In similar contexts, some state constitutions explicitly exclude economic conditions from the definition of "emergency." *See, e.g.*, COLO. CONST. art. X § 20(2)(c).

²¹¹ The definition as to what does *not* constitute an emergency could easily be expanded beyond these three items; however, I have included these three items based on the events leading up to the *Guinn* case where a mere legislative disagreement led to a constitutional crisis. *See supra* notes 75–81 and accompanying text. The legislative majority should not be able to trigger the emergency provision based on political disagreements, as that is not the purpose of the emergency provision.

²¹² *See* Elaine Kamarck, *In a National Emergency, Presidential Competence is Crucial*, BROOKINGS: FIXGOV (Mar. 20, 2020), <https://www.brookings.edu/blog/fixgov/2020/03/20/in-a-national-emergency-presidential-competence-is-crucial/> [<https://perma.cc/YK84-TWVS>] (outlining the history of federal government intervention during national, state, and local emergencies); Org. for Econ. Co-operation & Dev., *Government Support and the COVID-19 Pandemic*, OECD (April 14, 2020), <https://www.oecd.org/coronavirus/policy-responses/government-support-and-the-covid-19-pandemic> [<https://perma.cc/K868-L7DG>].

amendment, the state could not realize any new revenue. The state must use the increased revenue to eliminate or reduce a different tax, fee, or adjustment.²¹³

For example, under this provision, the Nevada legislature could by simple majority eliminate the \$4,000,000 tax exclusion for mining companies under NRS 363C.320.²¹⁴ By eliminating the exclusion, the state would have \$4,000,000 in new, unspent profit. To comply with the proposed constitutional amendment, the legislature could then reinvest that realized profit by reducing the general sales tax.²¹⁵ By reducing the general sales tax, the legislature would be shifting state funds from assisting big mining companies to assisting middle- and working-class Nevadans. This hypothetical illustrates how this constitutional provision could be a policy vehicle for eliminating tax loopholes that benefit only a powerful few. This exception should encourage the legislature to push more state funds to supporting middle- and working-class Nevadans through reduced tax burdens.

In putting together the elements described above, the second proposed amendment would read as follows:

Subsection 2 will not apply to any bill or joint resolution that creates, generates, or increases revenues if all of the following conditions are met: (1) the bill or joint resolution creates, generates, or increases revenue by eliminating or reducing a tax, fee, or adjustment deduction or exclusion; and (2) the revenue created, generated, or increased under this provision must be used for the elimination, exclusion, or reduction of other taxes, fees, or adjustment such that no new revenue is realized by the state.

This amendment faces a reasonable chance of success at the polls as well. However, this amendment is not as inherently clear as the first proposed amendment. Some voters may not understand why they should empower the legislature to eliminate tax or fee deductions by simple majority only then to require the legislature to provide a different deduction to offset the increased revenue. The success of the amendment would entirely depend on proponents' ability to explain the function of the amendment. The amendment's function is geared toward mitigating special-interest influence, as well as encouraging the legislature to push state funds toward programs that benefit all Nevadans, not just a select few.

CONCLUSION

Nevada is running on twenty-five years of the supermajority requirement. There are lessons in the crevasses of those years. The dawning days of the su-

²¹³ This is how Oregon has interpreted its supermajority requirement. *See* Girnus & Lyle, *supra* note 5. The Nevada Supreme Court took a similar approach to tax credits, finding that the reduction of a state tax credit was not subject to the supermajority requirement because the credits merely "reallocate[ed]" a portion of the total revenue, as opposed to actually increasing revenue. *See* Morency v. Dep't of Educ., 496 P.3d 584, 591 (Nev. 2021).

²¹⁴ NEV. REV. STAT. § 363C.320(4) (2015).

²¹⁵ *See* NEV. REV. STAT. § 372.105 (1955) (outlining the sales tax rate for the state).

permajority requirement give us insight into the motivations behind Gibbons's effort to restrain the purse strings of the state. It also informs how we view the supermajority requirement now—what seemed like a good fit in 1996 might not exactly be such a good fit anymore. Despite the supermajority requirement getting off to a rocky start in *Guinn I*, the Nevada Supreme Court in *Settelmeyer* breathed vigor and life back into the supermajority requirement. Yet, the *Settelmeyer* decision has reawakened concerns about the workability of the requirement, especially in a state with already limited revenue streams. However, in addressing these concerns, Nevada's political and policy realities propel us down a road of compromise. Compromise, of course, means that not everyone is going to get exactly what they want. But, if all sides are willing to give a little, Nevada's budgetary policy may shift away from benefiting a rich few and shift toward working for the everyday Nevadan.